

<b>Nobles v 400 Eighth Ave. Owners, LLC</b>
2013 NY Slip Op 32338(U)
September 20, 2013
Supreme Court, New York County
Docket Number: 0402994/04
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. KATHRYN FREED

PRESENT: JUSTICE OF SUPREME COURT

PART 5

Justice

Jack Noble

INDEX NO.

402994/04

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

53

400 Eight Avenue Street, LLC

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

FILED

OCT 02 2013

NEW YORK COUNTY CLERKS OFFICE

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

Dated:

9-20-13

SEP 20 2013

[Signature]

HON. KATHRYN FREED

J.S.C.

JUSTICE OF SUPREME COURT

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 5

-----X  
JACK NOBLES,

Plaintiff,

-against-

DECISION/ORDER  
Index No. 402994/2004  
Seq. No. 002

400 EIGHTH AVENUE OWNERS, LLC.,  
EAGLE COMMUNICATIONS, EXPANETS OF  
OF NEW YORK, INC. and A&S CONTRACTORS,

Defendants.

-----X  
400 EIGHTH AVENUE OWNERS, LLC,

Third-Party Plaintiff,

-against-

THE CITY OF NEW YORK,

Third-Party Defendant.

-----X  
KATHRYN E. FREED, J.S.C.:

**FILED**  
OCT 02 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

RECITATION, AS REQUIRED BY CPLR§2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....	.....1-2.....
ANSWERING AFFIDAVITS.....	.....
REPLYING AFFIDAVITS.....	.....
EXHIBITS.....	..... 3-6.....
OTHER.....	.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

The firm of Pasternack Tilker Napoli Bern, LLP moves pursuant to CPLR§ 2214(d) and CPLR §321(b)(2),for an Order permitting them to withdraw as counsel for deceased plaintiff, Jack

Nobles. No opposition has been submitted.

After a review of the papers presented, all relevant statutes and case law, the Court **denies** the Order to Show Cause without prejudice.

Factual and procedural background:

This OSC emanates from an action to recover damages for injuries sustained when on November 3, 1999, plaintiff was injured when he was struck in the head and left shoulder by a lighting fixture that fell from the ceiling of the office suite where he was working. Thereafter, plaintiff retained the firm of Brecher Fishman Pasternack Popish Feit Heller Rubin & Reiff, P.C., which subsequently changed its name to Pasternack Tilker Zeigler Walsh Stanton & Romano to represent him in a civil action predicated on causes of action for negligence in relation to his accident. Pasternack Tikler Zeigler Walsh Stanton & Romano subsequently merged with the firm of Napoli Bern in 2012 and continues to represent plaintiff under the name of Pasternack Tilker Napoli Bern.

Plaintiff signed a retainer on November 18, 1999. On October 11, 2002, a suit was commenced on his behalf via the filing of a Summons and Verified Complaint. Subsequently, on January 8, 2003 and January 14, 2003, issue was joined on behalf of defendants. On March 3, 2003, a preliminary conference was held and an Order setting forth the time periods by which to complete pre-trial discovery was rendered. On November 14, 2003, a compliance conference took place. On July 16, 2004, the matter was transferred via court order from Kings County to New York County.

Unfortunately, in 2005, plaintiff passed away. Pasternack Tilker Napoli Bern contends that it made "several fruitless attempts" to contact a representative of Mr. Nobles's estate. Additionally, they claim to have hired a private investigator to locate relatives of the deceased plaintiff to discuss

the status of the suit. The firm also contends that they sent several correspondences to “possible family members” regarding the suit and what appropriate steps to take with regard to said suit. In 2007, a woman identified as Roshana Nobles, daughter of the deceased plaintiff, contacted their office. She was apprised of the pending suit and also advised that an estate representative was required to be appointed in order to continue the suit.

Ms. Nobles apparently never gave the firm any indication of what her intent was with regard to her father’s suit because they assert that numerous phone calls and letters sent to her went repeatedly ignored. However, after a time, the firm again established contact with Ms. Nobles and informed her that it would no longer be pursuing the case on behalf of her father. Consequently, in February 2011, Ms. Nobles agreed to discontinue the action. The firm sent her correspondence to sign, authorizing them to officially discontinue the matter. No response was received. However, on October 22, 2012, the firm again contacted Ms. Nobles and another relative, Tyriq Nobles. The firm apprised both that they would need to appoint an administrator in order for the suit to continue. This correspondence was acknowledged via a signed certificate receipt but was met with no response.

In June 2011, the firm filed a motion to be relieved as counsel based upon a lack of cooperation from the deceased plaintiff’s relatives. On October 4, 2011, Justice Barbara Jaffe rendered a written decision denying said motion based on the fact that the firm failed to submit evidence that an estate administrator had indeed been appointed.

This Court finds itself in the same position as Justice Jaffe. While the Court understands the firm’s frustrated desire to be finally rid of this case, it has no alternative but to deny the instant motion for the same exact reason Justice Jaffe was compelled to. It is well established that “[a]

party's death divests a court of jurisdiction to conduct proceedings in an action until proper substitution has been made pursuant to CPLR 1015(a)" ( *Noriega v. Presbyterian Hosp. in the City of New York*, 305 A.D.2d 220 [1<sup>st</sup> Dept. 2003] ). Therefore, any order after the party's death and before substitution, is deemed void ( see *Manto v. Cerbone*, 71 A.D.3d 1099 [2d Dept. 2010] ).

In the case at bar, the firm asserts that "[t]he plaintiff's estate representative's failure to communicate with our office to discuss the decedent's case and provide us with the necessary assistance to continue the prosecution has made it effectively impossible for our office to zealously prosecute this action on their behalf. Accordingly, this office has no choice but to respectfully request this Court's permission to withdraw as deceased plaintiff's attorney of record." ( see OSC, ¶ 23). Frankly, the Court is confused by this statement. Is the firm contending that an estate representative had actually been appointed subsequent to and in accordance with Justice Jaffe's decision? If so, this Court clearly needs to know the identity of this individual and the circumstances of his/her appointment. Absent the appointment of an estate administrator, this Court cannot grant the requested relief.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that the Order to Show Cause is denied without prejudice; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: September 20, 2013

SEP 20 2013

**FILED**

OCT 02 2013 ENTER:

**NEW YORK COUNTY CLERKS OFFICE**

Hon. Kathryn E. Freed  
**HON. KATHRYN E. FREED**  
**JUSTICE OF SUPREME COURT**